Criminal Defense Attorneys of Michigan

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The Honorable Robert Young
Chief Justice
Michigan Supreme Court
Post Office Box 30052
Lansing, Michigan 48909

re: *ADM File No. 2010-13*
Proposed Amendment of MCR 6.001

Dear Chief Justice Young:

I am writing, on behalf of the Rules and Laws Committee of the Criminal Defense Attorneys of Michigan, in opposition to the proposed amendment to MCR 6.001, as contained in ADM File No. 2010-13. CDAM is in agreement with the comments already posted in opposition from the State Appellate Defender Office and Attorney Kenneth Mogill, and I apologize if the discussion below unduly duplicates their discussion of the relevant issues. At the outset, suffice it to say that preliminary examinations serve a very valuable function for the prosecution, the defense, and the courts. It is at this stage that cases frequently are resolved, and, when not resolved, where various matters are clarified and narrowed for the trial courts. Restricting discovery at this stage will only make preliminary examinations less effective, and the entire criminal justice system less efficient, for all.

Without discovery in the manner provided by MCR 6.201, it is very difficult, and in many cases impossible, for the defense to adequately evaluate the case for purposes of determining whether quick resolution is appropriate or, instead, if the case must be litigated. Absent that discovery, the defense will be required more often not only to hold preliminary exams where waivers otherwise might have been tendered, but to conduct them in a more deliberate fashion as counsel attempts to learn about the evidentiary underpinnings that otherwise s/he will be in the dark about. This likely will result in more witnesses being called, witness examinations being lengthier, and the unnecessary clogging of district court dockets. Where later discovery causes counsel to believe that an examination was unfairly truncated, counsel will be required to bring remand motions, and more interlocutory appeals may result. Finally, where counsel improvidently waives or cuts short a preliminary examination in the absence of adequate discovery, s/he will be more vulnerable to claims of ineffective assistance.

Supporters of the amendment point out that discovery still may proceed in the district courts, pursuant to general Constitutional principles and existing jurisprudence, see, e.g., Brady v Maryland, 373 US 83 (1963), In re Bay County Prosecutor, 109 Mich App 476 (1981). While undoubtedly true, the practice will be more inconsistent and haphazard as different courts and prosecutors struggle to determine what quantum of pre-PE discovery is required under those principles. Again, more appeals to the circuit courts and the Court of Appeals undoubtedly will result to resolve disagreements over the scope of what is required.

Supporters also claim that application of MCR 6.201 prior to bindover is unreasonable because various items of discovery under the rule cannot be provided at that stage of the proceedings. For instance, the prosecution's trial witness list cannot be provided before bindover has occurred, nor may a prosecutor have had the time or even the necessity to determine if an expert witness will testify, much less have obtained the expert-witness information required for disclosure under the rule. However, this certainly does not preclude the prosecution from turning over as discovery those items which are in its possession prior to preliminary examination. This, in fact, has become the standard practice in district courts throughout this State.

And that brings me to my final point. For many years now, the practice has been for the prosecution to provide discovery prior to preliminary examination, pursuant to MCR 6.201. This practice was recognized in People v Greenfield (On Reconsideration), 271 Mich App 442, 449-450 n 6; 722 NW2d 254 (2006). I am unaware of downside to this practice, and indeed it has been my experience that early discovery not only has been instrumental in providing due process to the defendant but also speeds the appropriate resolution of cases.

CDAM urges the Court to reject this proposal, and instead to adopt the recommendations of SADO that (1) the court rules be clarified to confirm that discovery continue be provided prior to preliminary examination, and (2) the court rule be expanded to require such discovery in misdemeanor cases as well.

Sincerely,

John A. Shea, Co-Chair
Rules and Laws Committee
Criminal Defense Attorneys of Michigan

cc: Corbin R Davis, Clerk, Michigan Supreme Court